NO. 001184 JAN 16 2001

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

THE PEOPLE,

Plaintiff and Respondent,

v.

JADIR ALEXANDER MILLER,

Defendant and Appellant.

v. California

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

JANICE M. DEATON
Attorney for Petitioner
California Bar No.135188
2366 Front Street
San Diego, CA 92101
(619) 231-1107

Attorney for Petitioner
Jadir Alexander Miller

62pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the California Court of Appeal and the Supreme Court Decisions Holding it was not Reversal Per Se to Give a Jury Instruction Which Allowed the Jury to Convict Petitioner on a Preponderance of the Evidence Standard and Therefore Violated Petitioner's Due Process Rights and Right to a Jury Trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution Conflict with this Court's Decision in *Sullivan V. Louisiana*, 508 U.S. 275 (1993) and Requires Resolution by this Court.

TOPICAL INDEX

QUESTIONS PRESENTED FOR REVIEW i

TOPICAL INDEX ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

REASONS FOR GRANTING THE WRIT

Whether the California Court of Appeal and the Supreme Court Decisions Holding it was not Reversal Per Se to Give a Jury Instruction Which Allowed the Jury to Convict Petitioner on a Preponderance of the Evidence Standard and Therefore Violated Petitioner's Due Process Rights and Right to a Jury Trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution Conflict with this Court's Decision in Sullivan v. Louisiana, 508 U.S. 275 (1993) and Requires Resolution by this Court. 11

A. Introduction 11

B. The Jury Instruction Given in Petitioner's Case was Unconstitutional as it Denied Him of the Right to a Jury Verdict of Guilt Beyond a Reasonable Doubt 14

C. The Denial of Petitioner's Right to Have the Offense Proven Beyond a Reasonable Doubt was Structural Error and Therefore Defies Harmless Error Review 17

D. If this Court holds the Harmless Error Standard Set Out in *Chapman v. California*, 386 U.S. 18 (1967) Applies, It Must Reverse Petitioner's Case Because the Error was not Harmless Beyond a Reasonable Doubt. 23

CONCLUSION 30

DECLARATION OF SERVICE 31

APPENDIX "A"

APPENDIX "B"

TABLE OF AUTHORITIES

Supreme Court Cases

Brecht v. Abrahamson,
507 U.S. 613 (1993) 18

California v. Roy,
519 U.S. 2 (1977) 27

Chapman v. *California*,
386 U.S. 18 (1967) 13,18,19,23,29

Estelle v. *McGuire*,
502 U.S. 62 (1991) 14,16

Francis v. Franklin,
471 U.S. 307 (1985) 17

Gideon v. Wainwright,
372 U.S. 335 (1963) 19

In re Winship
397 U.S. 358 (1970) 17

Johnson v. United States,
520 U.S. 461 (1977) 19

Kotteakos v. United States,
328 U.S. 750, 755 (1946) 27

McKaskle v. Wiggins,
465 U.S. 168 (1984) 19

Neder v. *United States*,
527 U.S. 1 (1999) 14,18,19

Rose v. Clark,
478 U.S. 570 (1986) 18,20

Spencer v. *Texas*,
385 U.S. 554 (1967) 16

Sullivan v. *Louisiana*,
508 U.S. 275 (1993). 11,13,14,17-20,22,23

Tumey v. *Ohio*,
273 U.S. 510 (1927) 19

United States v. *Olano*,
507 U.S. 725(1993) 22

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 19

Waller v. *Georgia*,
467 U.S. 39 (1984) 19

Yates v. *Evatt*,
500 U.S. 391 (1991) 14

Federal Cases

Suniga v. *Bunnell*,
998 F.2d 664 (9th Cir. 1993) 21,22

United States v. *Washington*,
819 F.2d 221 (9th Cir. 1987) 26,27

California Cases

People v. *Falseta*,
21 Cal.4th 903 (1999) 13,15,16
People v. *Fitch*,
55 Cal.App.4th 172 (1997) 16

People v. *Harris*,
60 Cal.App.4th 727 (1998) 16

People v. *Jeffries*,
2000 Daily Journal DAR 9077 (2000) 16

People v. *O'Neal*,
78 Cal. App. 4th 1065 (2000) 17

People v. *Regalado*,
78 Cal. App. 4th 1056 (2000) 17

People v. *Van Winkle*,
75 Cal. App. 4th 133 (1999) 17

People v. *Vichroy*,
76 Cal.App.4th 92 (1999) 16

People v. *Waples*,
79 Cal. App. 4th 1389 (2000) 16

CONSTITUTION

United States Constitution, Fifth Amendment 3,11,13,14 22

United States Constitution, Sixth Amendment ... 3,11,13,14 17,20,22

United States Constitution, Fourteenth Amendment . 3,11,22

CALJIC

CALJIC No. 1.01 24

CALJIC No. 2.00 24

CALJIC No. 2.01 24,25,26

CALJIC No. 2.50.01 ..... 11,13-16, 23,25

CALJIC No. 2.90 24,26

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

THE PEOPLE,	)
Plaintiff and Respondent,	)
v.	)
JADIR ALEXANDER MILLER,	)
Defendant and Appellant.	)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE, STATE OF CALIFORNIA

Petitioner, Jadir Alexander Miller, respectfully prays that a writ of certiorari issue to review the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, affirming petitioner's conviction entered on August 10, 2000.

OPINION BELOW

On August 10, 2000, Court of Appeal, Fourth Appellate District, Division One the Court of Appeals entered its opinion affirming appellant's conviction. On September 12, 2000, petitioner filed a petition for review with the California Supreme

Court (Case No. S091556). The Supreme Court denied this petition on October 18, 2000. A copy of the unpublished opinion of the Court of Appeal is attached hereto as Appendix "A". A copy of the Order of the California Supreme Court denying Petitioner's Petition for Review is attached hereto as Appendix "B".

JURISDICTION

On August 10, 2000, the Court of Appeal, Fourth Appellate District, Division One, entered its opinion affirming appellant's conviction. On September 12, 2000, petitioner filed a petition for review with the California Supreme Court (Case No. S091556). This petition was denied on October 18, 2000. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). This petition is filed in a timely fashion as it is submitted within ninety (90) days of the date of the denial of the Petition for Review as provided in Rule 13(1), Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. . .

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. . .

STATEMENT OF THE CASE

On April 6, 1998, the Imperial County District Attorney's office filed an amended information charging petitioner with attempted rape, a serious felony (Pen. Code, §§ 664, 261, 1192.7, subd. (c)(3)) (Count I); false imprisonment by violence (Pen. Code, § 236) (Count II); and attempted

premeditated murder, a serious felony (Pen. Code, §§ 664, 187, 1192.7, subd. (c) (Count III).

It was further alleged that petitioner's sentence was subject to enhancement because during the commission of Count I he inflicted great bodily injury. (Pen. Code, § 12202.7, subd. (a). (CT 113-114.) On December 29, the trial court permitted the prosecutor to add the great bodily injury enhancement allegation to Count III. (Pen. Code, § 12202.7.) (CT 343; RT 841-843.)

On December 29, 1998, the trial court granted defense counsel's motion to dismiss the premeditation allegation contained in Count III. (RT 837.)

On December 31, 1998, the jury found petitioner guilty of Counts I through III. (RT 1011-1012.) The jury, however, deadlocked on the great bodily injury enhancement allegations. (RT 1016, CT 421.) On January 11, 1999, after the people indicated that it did not intend to retry the great bodily injury enhancements, the court granted defense counsel's motion to dismiss the enhancement allegations. (CT 427.)

On March 15, 1999, the trial court denied petitioner's motion for a new trial and sentenced petitioner to a term of 10

years: the upper term of nine years for Count III, and a consecutive one-third the mid term of one year for Count I. The trial court stayed imposition of the upper term of three years for Count II, ordered petitioner to register as a sex offender (Pen. Code, § 290), and pay restitution in the amount of $1,000 (Pen. Code, §1202.4, subd. (b)). The court suspended imposition of an additional fine in the amount of $1000 (Pen. Code, § 1202.45) and awarded petitioner 546 days' credit. (CT 228; RT 1169.)

On March 19, 1999, petitioner timely filed his notice of appeal. (CT 229.)

In an opinion filed August 10, 2000, the court of appeal affirmed the judgment in its entirety. (Opinion p. 1, attached hereto as Appendix "A".)

On September 12, 2000, petitioner filed a petition for review with the California Supreme Court (Case No. S091556). This petition was denied on October 18, 2000.

STATEMENT OF FACTS

For purposes of this petition, petitioner accepts those facts stated in the opinion filed by the court of appeal and quotes them verbatim as follows:

"On November 29, 1997, the victim met her fiancee at

Drifter's saloon in Imperial, where they and some friends stayed for three to four hours. The victim drank no alcoholic beverages because she was the designated driver.

"People at Drifter's generally wore jeans, boots and cowboy hats. Miller attracted notice because he was wearing dress pants, a button-up shirt and jacket. After the friends left, the victim stated she was getting tired and wanted to leave. She walked to the restroom. On the way, a woman sitting next to Miller asked her the time. The victim answered and then continued walking down the hallway to the restroom.

"A surveillance camera recording the people in Drifter's that evening showed Miller and the woman who spoke to the victim together. It showed the victim walking down the hallway toward the restroom and Miller walking toward the restroom a short time later.

"The victim testified another woman walked into the restroom ahead of her and went into the first stall. The victim, who went into the back stall, later heard the other woman leave, and as she finished using the restroom, heard someone come in. As she walked from her stall she caught a glimpse of someone standing in the first stall and thought the person might be a man

because of his short, cropped hair, his heavy set, stocky appearance, and because he appeared to be wearing a jacket.

"As the victim washed her hands, she glanced in the mirror and saw Miller, wearing a suit, coming around the corner of the first stall toward her. Miller grabbed the victim round her neck and pulled her back so tightly she could not breathe or speak. As she struggled, she lost consciousness.

"When the victim did not return from the restroom, her fiancee walked past the closed restroom door and looked for her in the parking lot. He then noticed the restroom door, partly opened, and saw the victim's shoes placed in the first stall and the victim lying unconscious on the floor.

"The victim had blood in her mouth and the whites of her eyes were red. There were red marks on her neck, her shoes were off, her bra was pushed up above her chest and her jeans were pulled down very low on her hips. Her torn underwear was floating in the toilet and a pair of men's underwear was on the floor. The nurse who examined her testified there were no signs of vaginal trauma. The victim testified when she regained consciousness she said a man in a suit had attacked her. The bartender stated she knew who he was; Miller had given her his

business card.

"Al Gervin, who had met Miller on an earlier occasion, saw him at Drifter's that night and talked with him briefly. He said Miller was with a man and a woman; he thought he saw them leaving, but a half-hour later he saw Miller again leave the bar, looking nervous and fidgety. After that time Gervin heard someone had been hurt in the women's restroom.

"Norberto Martinez testified he, his former girlfriend and Miller were together at a bar that night. Martinez said when they first got there Miller left quickly, and when he returned said he had gone to the girls' restroom by mistake and some girl had gotten angry with him.

"At Miller's residence, police spoke with his mother and searched his home. After arresting Miller, Officer Sean Acuna advised him of his *Miranda* rights and told him he was investigating an attempted rape and assault that had occurred at Drifter's. Miller said he had gone there with two friends, but denied being involved in the incident. He said he appeared on the videotape because he walked to the parking area to look for his friends and then walked back still looking for them. He said he and Martinez drank about six pitchers of beer and Clamato; he

was drunk, but remembered his actions. He gave Acuna permission to retrieve the clothing he had worn that night. Miller's mother said Miller told her he had had a confrontation with a woman when he went into the women's restroom by mistake. She said she had already washed his clothing.

"After Acuna told Miller of this conversation, Miller said he had gone to the women's restroom by mistake, had soiled his underwear and left them behind. He said as he was leaving a woman called him a name and pushed him. He pushed her back and left. When asked if it were possible she could have fallen and become unconscious, he said it was possible. Acuna asked if it were also possible that he had grabbed her around the neck. Miller said it was possible and he might have done it with his thumbs.

"Miller said a pair of pants, shirt and jacket from his closet were the clothes he had worn to Drifter's. The victim identified the shirt and jacket as those her attacker was wearing.

"Miller's mother testified when he came home the morning after the incident, he was wearing a black suit, and a white shirt with maroon stripes. He told her the night before he drank Clamato, beer and tequila at a bar, had to use the restroom,

went into the women's restroom by mistake, a woman touched him and used some strong words and he pushed the woman aside and then returned to the bar.

"The defense claimed the victim had misidentified Miller, arguing until she viewed the videotape she did not identify him or say the man who attacked her had been at the bar all evening. The defense also argued no physical evidence linked Miller to the attack. Miller did not testify.

"*Prior Uncharged Acts*

"Laura Casillas testified she met Miller in Mexicali in 1995 or 1996 when he offered her a ride, stating he would take her home. Instead Miller drove to a dark location and forced her to have sexual intercourse. He then apologized and took her to a pharmacy to buy medicine for her daughter. She said she did not call police because the Mexican police would not do anything.

"Casillas testified about six months later Miller came to her house and they began a dating relationship. At first he treated her well, but one night forced her to perform oral sex, she yelled and the police responded. Miller talked with the police and told her he had taken care of everything. About a year later

he invited her to work for him in the United States. Casillas worked in Miller's business for three to four months, lived at his house and had a consensual sexual relationship with him. She testified she did so because he said he would help her daughter immigrate. She said one day Miller poured whiskey into her mouth, and choked her with his forearm and thumbs. He told her to take off her clothes and had sexual intercourse with her, then cried and said he did not mean to do it. About a week later she called police. (Opinion, pp. 2-7.)

REASONS FOR GRANTING THE WRIT

I

Whether the California Court of Appeal and the Supreme Court Decisions Holding it was not Reversal Per Se to Give a Jury Instruction Which Allowed the Jury to Convict Petitioner on a Preponderance of the Evidence Standard and Therefore Violated Petitioner's Due Process Rights and Right to a Jury Trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution Conflict with this Court's Decision in *Sullivan V. Louisiana*, 508 U.S. 275 (1993) and Requires Resolution by this Court.

A. Introduction

Over defense counsel's objection, the court instructed using former CALJIC 2.50.01. (RT 859, 865, 879, 1164.) This instruction provides as follows:

Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense [on one or more occasions] other than that charged in this case. [¶] 'Sexual offense' means a crime under the laws of a state or of the United States that involves any of the following:

A, Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

B, Contact without consent between the genitals or anus of the defendant any part of another person's body.

C, Deriving sexual pleasure or gratification from the infliction of bodily injury or physical pain on another person.

D, An attempt to engage in specific sexual conduct identified in subparagraphs, A, B, or C herein.

If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type of sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of attempted rape of which he is accused in Count I.

Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(RT 971-972, CT 376; emphasis added.)[1]

As set out below, this instruction violated petitioner's Fifth Amendment right which requires proof of an offense beyond a reasonable doubt and his Sixth Amendment right to a jury verdict. See, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The Court of Appeal conceded this instruction was erroneous. ("When an instruction viewed in isolation appears deficient, the reviewing court must consider it in the context to the whole record." Opinion, p. 18.) Without addressing the constitutionality of the instruction, the court of appeal found that because of the strong evidence, any instructional error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In reaching its decision, the court rejected petitioner's contention that the error was reversible per se pursuant to *Sullivan* v. *Louisiana,* 508 U.S. 275 (1993). The

---

[1] CALJIC No. 2.50.01 was revised in 1999 to add the language:

> ***"However, if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offenses, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide.***

CALJIC No. 2.50.01 (1999 rev.) (*People* v. *Falseta,* 21 Cal.4th 903, 923 (1999) emphasis added.)

court concluded that this error, if any, was to be reviewed by a harmless error analysis. *(Neder* v. *United States,* 527 U.S. 1 (1999); *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991), disapproved on other grounds in *Estelle* v. *McGuire,* 502 U.S. 62, 72-73, fn.4 (1991). (Opinion, p. 20.)

This court should grant certiorari to decide whether the instruction, which, as given, allowed the jury to convict petitioner of a crime on a standard less demanding than beyond a reasonable doubt, and was therefore a structural defect under *Sullivan v. Louisiana, supra*, 508 U.S. 275. This Court should grant certiorari to decide whether CALJIC 2.50.01 as given violated petitioner's Fifth Amendment due process rights, his Sixth Amendment right to a jury verdict, and this Court's decision in *Sullivan v. Louisiana.*

B. The Jury Instruction Given in Petitioner's Case was Unconstitutional as it Denied Him of the Right to a Jury Verdict of Guilt Beyond a Reasonable Doubt

Under the trial court's instruction, the jury could (1) find by a preponderance of the evidence that petitioner had sexually assaulted Ms. Casillas, (2) infer from this fact that petitioner was predisposed to commit sexual assaults, and (3) further infer that he was not only likely to commit, but did in fact commit the

attempted rape of Ms. Wymore, even though they were not convinced beyond a reasonable doubt that he had perpetrated this crime.

Before turning to the question of standard of error to apply here, petitioner must show the instruction was erroneous and given in violation of his constitutional rights. CALJIC No. 2.50.01 was revised in 1999 to admonish the jury that it cannot convict a defendant solely in reliance on the evidence that he committed prior sex offenses.

The 1999 revision of CALJIC 2.50.01 added the following language:

> ***"However, if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offenses, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide.***

CALJIC 2.50.01 (1999 Rev.); *People v. Falseta*, *supra*, 21 Cal.4th 923. Because the trial court's instruction failed to include such an admonition, there was no assurance that petitioner was tried and convicted for his present, not his past, offenses and that he was thus provided his rights to due process of law. *Ibid.* As the California Supreme Court stated in *Falseta*,

> ***the jury was admonished not to convict defendant solely in reliance on the evidence that he committed prior sex offenses. This admonition helps assure that the defendant will be tried and convicted for his present, not his past, offenses.*** (See *Estelle* v. *McGuire* [502 U.S. 62, 75 (1991)]; *Spencer* v. *Texas* [385 U.S. 554, 561 (1967)]; *People v. Harris,* 60 Cal.App.4th 727, 737 (1998); [*People* v. *Fitch* 55 Cal.App.4th 172 (1997)] at p. 184.) (*People* v. *Falseta, supra,* 21 Cal.4th 903, 923, emphasis added.)

Here, the jury was instructed that it could use the evidence of prior sex crimes to find that petitioner had a propensity to commit such crimes, which in turn may have shown that he committed the charged offenses. Proof by the preponderance of the evidence that petitioner committed prior sexual offenses may not act as a proxy or substitute for proof beyond a reasonable doubt of petitioner's guilt of the currently charged offense. Because the instruction permitted the jury to rely solely on the prior sex crimes evidence, it was erroneous and constitutionally infirm. See, e.g., *People v. Falseta, supra,* 21 Cal.4th 923.[2] Having demonstrated the jury instruction was

---

[2] In addition to *People v. Falsetta*, the California Court of Appeal in *People v. Vichroy*, 76 Cal.App.4th 92 (1999), also found that CALJIC No. 2.50.01 was constitutionally infirm. Other California courts, however, have found no error arose from the use former CALJIC No. 2.50.01. *People* v. *Jeffries*, 2000 Daily Journal DAR 9077 (2000), *People* v. *Waples*, 79 Cal. App. 4th 1389, 1396-1398 (2000); *People* v.

unconstitutional, it remains for this Court to determine which category of error this case belongs in.

C. The Denial of Petitioner's Right to Have the Offense Proven Beyond a Reasonable Doubt was Structural Error and Therefore Defies Harmless Error Review

The Sixth Amendment right to a jury trial includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan v. Louisiana, supra*, 508 U.S. at 277.

> What the factfinder must determine to return a verdict of guilty is prescribed by the due process clause. The prosecution bears the burden of proving all elements of the offense charged (citations omitted) and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.

Sullivan v. Louisiana, 508 U.S. at 277-278; *In re Winship* 397 U.S. 358, 364 (1970). Jury instructions relieving state prosecutors of this burden violate a defendant's due process rights, subvert the presumption of innocence and invade the truth finding task assigned solely to juries in criminal cases. *Sullivan v. Louisiana, supra*, 508 U.S. 275; *Francis v. Franklin*,

---

O'Neal, 78 Cal. App. 4th 1065, 1078-1079 (2000); *People* v. *Regalado*, 78 Cal. App. 4th 1056, 1063-1064 (2000); *People* v. *Van Winkle*, 75 Cal. App. 4th 133, 147-149 (1999).

471 U.S. 307, 313 (1985). These types of constitutional violations are structural errors which "infect the entire trial process, and necessarily render a trial fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8 (1999), quoting *Brecht v. Abrahamson*, 507 U.S. 613, 630 (1993); *Rose v. Clark*, 478 U.S. 570, 577 (1986). As such they defy harmless error review. *Ibid.*

In *Sullivan v. Louisiana*, the trial judge gave the definition of "reasonable doubt" that had been held unconstitutional. *Sullivan v. Louisiana, supra*, 508 U.S. at 277. On direct appeal, and as in this case, the Supreme Court of Louisiana held the instruction was erroneous, but held that the erroneous instruction was harmless beyond a reasonable doubt. *Ibid.* The issue for this Court in *Sullivan*, then, was whether the harmless error analysis under *Chapman v. California*, *supra*, 386 U.S. 18, applied or whether a more stringent "prejudicial per se" standard applied. *Id.* at 279 ("The question in the present case is to which category the present error belongs.")

Although a strong presumption exists that even constitutional violations may be harmless (*Rose v. Clark, supra,* 478 U.S. at 579), this Court has held that some constitutional

violations are not susceptible to harmless error analysis because they are "structural" and thus presumed prejudicial. *Neder v. United States, supra,* 527 U.S. at 8, citing, *Johnson v. United States,* 520 U.S. 461 (1977); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio,* 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery,* 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168 (1984) (denial of self representation at trial); *Waller v. Georgia,* 467 U.S. 39 (1984) (denial of public trial); and *Sullivan v. Louisiana, supra,* 508 U.S. at 275 (defective reasonable doubt instruction).

In *Neder,* petitioner under-reported $5,000,000 on his tax returns. In *Neder,* the trial judge gave an instruction which omitted the materiality element of the offense. *Neder v. United States, supra,* 527 U.S. at 7. Petitioner did not contest the element of materiality at trial, nor did he suggest on appeal he would introduce any evidence bearing upon the issue of materiality if so allowed. *Id.,* at 15. This Court held the omission of an element is subject to the harmless error analysis because the jury instruction error did not vitiate all the jury's findings. *Id.* at 11. A misdescription of the burden of proof is not subject to the *Chapman* analysis.

In *Sullivan* v. *Louisiana, supra*, 508 U.S. 275, the court held that a misdescription of the burden of proof vitiates the jury's findings because nothing has been proved beyond a reasonable doubt. This resulted in structural error there since there "has been no jury verdict within the meaning of the Sixth Amendment." Id., at 280. The court held that "proof beyond a reasonable doubt and a jury trial are interrelated" so that a jury trial under the Sixth Amendment "is a jury verdict of guilty beyond a reasonable doubt." (*Id.* at 278.) According to the court:

> [T]he essential connection to a "beyond-a-reasonable-doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation--its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Rose v. *Clark* (1986) 487 U.S. 578 (1986); *Sullivan* v. *Louisiana, supra,* 508 U.S. at 281.)

The Court of Appeal here had to "engage in pure speculation" regarding *its* view of what a reasonable jury would have done. This Court's concern in *Sullivan* applies forcefully here, where there was simply no jury verdict rendered based

upon the correct burden of proof – beyond a reasonable doubt.

A Ninth Circuit case further illustrates the issue in petitioner's case. In *Suniga v. Bunnell*, 998 F.2d 664, 668 (9th Cir. 1993) (amended opinion), the trial court instructed the jury on the theory of culpability that did not exist – the felony murder rule. *Suniga v. Bunnell, supra*, 998 F.2d at 668. The trial court also instructed the jury on the theory the killing was committed with malice aforethought. *Id.*, at 666. Thus the jury might have convicted on the appropriate theory – malice aforethought – or on the theory of culpability that did not legally exist – the felony murder theory. In *Suniga*, the Ninth Circuit could not tell what theory the jury used. As the court stated, "In fact, because the jury did not need to be unanimous about the theory it used, Suniga was improperly convicted if even one juror decided that the felony murder theory would be sufficient. [Citation omitted] Of course, we cannot assume that the jury simply ignored the felony murder instruction. It was told that it was 'to apply the rules of law' that the judge stated, and felony murder was one of them. Nor could it simply ignore one rule and chose another for it was also told 'not to single out any . . . individual point or instruction and ignore the others.'" *Suniga v. Bunnell, supra,*

998 F.2d at 669. Because the effect of the instruction was to allow the jury to convict the defendant on a theory that does not exist within the jurisdiction, the Ninth Circuit held this fundamental error to be reversible per se. *Id.*, at 670.

In this case, because the instruction permitted the jurors to infer guilt solely from the prior sex crimes found by a preponderance of the evidence, per se reversal under the Sixth and Fourteenth Amendments is required. As in *Suniga*, any juror would have been perfectly justified in deciding there was no need to find petitioner committed the offense charged beyond a reasonable doubt because they could find by a preponderance of the evidence he committed the prior sex offenses and infer from that fact alone he was guilty of the charged offense. See, *Suniga v. Bunnell, supra*, 998 F.2d at 670, citing *United States v. Olano*, 507 U.S. 725 (1993). Even if this Court were to find there is overwhelming evidence pointing to petitioner's guilt, it can nevertheless base a harmless error determination on this fact because it is impossible to tell which theory the jury followed in reaching a general verdict. *Ibid.*, other citations omitted. Petitioner's conviction must be reversed. *Sullivan v. Louisiana, supra*, 508 U.S. at 280.

D. If this Court holds the Harmless Error Standard Set Out in *Chapman v. California*, 386 U.S. 18 (1967) Applies, It Must Reverse Petitioner's Case Because the Error was not Harmless Beyond a Reasonable Doubt.

This Court explained in *Sullivan v. Louisiana*, that the harmless error inquiry under *Chapman* "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana, supra*, 508 U.S. 279, quoting *Chapman v. California, supra*, 386 U.S. at 24. This Court went on,

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." [Citations] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

Sullivan v. Louisiana, supra, 508 U.S. at 279; emphasis in original.

An analysis of the confusion created by CALJIC No. 2.50.01, coupled with the other instructions, demonstrates the

verdict rendered in this case was not unattributable to the error and was not harmless beyond a reasonable doubt.

The jury instructions in this case, as a whole, were conflicting and confusing. In addition to the prior sex offense instruction, the jury was also instructed to consider the instructions as a whole (CALJIC No. 1.01). They were instructed on the presumption of innocence and reasonable doubt (CALJIC No. 2.90), and on the sufficiency of circumstantial evidence, including the requirement that "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." (CALJIC No. 2.01.) (CT 357, 386, 363.)

The trial court defined an inference for the jurors as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence." (CT 362; CALJIC No. 2.00.) However, the lone instruction which might have informed the jurors of the need to find an inference established beyond a reasonable doubt comes from the reference in the CALJIC No. 2.01 instruction which states in

part:

> [E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. (CT 363; CALJIC No. 2.01.)

Juror confusion arises from a conflict between the CALJIC No. 2.01 instruction and the uncharged offense instruction (CALJIC No. 2.50.01), which does not require proof beyond a reasonable doubt. While CALJIC No. 2.01 told the jurors "each fact or circumstance on which [an] inference rests must be proved beyond a reasonable doubt," CALJIC No. 2.50.01 expressly contradicted this by permitting the jurors to find facts on which an inference of guilt rests proved only to a preponderance of the evidence. The conflict in the instructions created a reasonable likelihood that jurors would logically find the entire paragraph of the circumstantial evidence instruction inapplicable to the uncharged sex offenses and that inferences drawn from facts of the uncharged crimes need not be proved beyond a reasonable doubt but by the preponderance of the

evidence standard.

Nor does CALJIC No. 2.90 (requiring the prosecution to prove guilt beyond a reasonable doubt), resolve the conflict created between the circumstantial evidence instruction and the uncharged offenses instruction. As noted, a reasonable juror reading the CALJIC No. 2.01 instruction could conclude that the entire paragraph referencing proof of facts beyond a reasonable doubt, including the provision regarding proof of inferences beyond a reasonable doubt, would not apply to uncharged crimes.

Jury instructions that create a reasonable likelihood that the jurors would not correctly understand the applicable law constitute error. In *United States* v. *Washington,* 819 F.2d 221, 226 (9th Cir. 1987), the court found reversible error in jury instructions which first told the jury that an assault crime required specific intent to do bodily harm and then listed the elements of the offense without any reference to intent. When the court later instructed that the offense was not a specific intent crime, the court of appeal remarked, "we find it difficult to imagine jury instructions which are more ambiguous and equivocal as these." *Ibid.* Just as in *United States v.*

Washington, supra, these jury instructions were confusing and ambiguous. Petitioner's conviction must be reversed. *United States v. Washington, supra*, 819 F.2d 226.

Another reason this error was not harmless beyond a reasonable doubt is, contrary to the Court of Appeal opinion, the weight of the evidence in this case was not overwhelming.[3] (See, Opinion, p. 19.) Wymore's "split second" identification of petitioner in the bathroom did not overwhelmingly establish petitioner's guilt. Wymore did not identify petitioner until she actually saw the video. She did not tell the officer that the assailant was the man at the bar. There was, moreover, no physical evidence, hair, semen, saliva, or blood, linking petitioner to the attack. Petitioner's coat did not have any material linking her to Wymore. The rape kit did not link petitioner to the crime. The two hairs found on Wymore's shirt did not belong to petitioner.

These facts were completely consistent with petitioner's

---

[3] The review should not be based on the sufficiency of the evidence, but instead the effect of the error on the jury. See, *Kotteakos v. United States*, 328 U.S. 750, 755 (1946); see also, *California v. Roy*, 519 U.S. 2, 7-8 (1977) (Scalia, J., concurring) ("a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime and absent such a verdict the conviction must be reversed no matter how inescapable the findings to support the verdict might be").

version of the events, namely that he was in the woman's restroom earlier than the time of the attack on Wymore.

There was, moreover, evidence of another person. The Imperial County criminologist found blood that was unidentifiable and that could not be linked to petitioner or Wymore. (RT 562-565, 569, 574-575, 583, 585.) Similarly, Wymore testified that she may have broken a fingernail on the assailant's face. (RT 750.) However, the blood taken from Wymore's broken nail during the SART examination was not identified as blood belonging to petitioner. (RT 764.) Ms. Stam, the Riverside Department of Justice crime laboratory criminalist, analyzed hairs taken from Wymore's knit shirt and concluded that they could not have come from petitioner or Wymore and belonged to a third person. (RT 598, 604, 606.)

There were also questions concerning the accuracy of the investigation. Sergeant Bielma's original report was improperly supplemented and failed to include information that Fennell, Wymore's husband, was a suspect, was uncooperative, handcuffed, and was placed in the back of a patrol car. (RT 142, 166, 222, 224.) Similarly, even though Officer Acuna said that petitioner first denied going inside the woman's restroom,

Acuna could not find any place in the taped interview in which petitioner made such a denial. (RT 519-520, 522.)

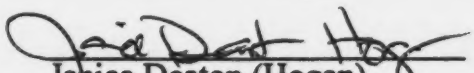
Officer Bielma did not identify or interview the other 15 people who were in the bar that evening. (RT 224-226.) Similarly, Officer Joe Garibaldi only interviewed three people at the bar: Sherry Farrar, Lynette Koelling and Ray Koelling. (RT 257.) He conceded that a normal investigation would require that he take the names of all the people who were present at the bar so they could be interviewed at a later time. (RT 262.)

Petitioner's case must be reversed because, in spite of the less than overwhelming evidence, the jury here could convict petitioner based on the prior sex offense evidence. That evidence, which was clearly inflammatory and prejudicial, contributed to the verdict in this case. Thus, this Court cannot find beyond a reasonable doubt that the unconstitutional jury instruction did not contribute to the verdict obtained. *Chapman v. California, supra*, 386 U.S. at 24. Petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse petitioner's conviction.

Dated: January 15, 2001 Respectfully submitted,



Janice Deaton (Hogan)
Attorney for Petitioner

APPENDIX "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	D033142
Plaintiff and Respondent,	)	
v.	)	(Super. Ct. No. SCD CF-4839)
JADIR ALEXANDER MILLER,	)	
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Imperial County, Raymond Ayala Cota, Judge. Affirmed.

Jadir Alexander Miller appeals a judgment convicting him of attempted rape (Pen. Code, §§ 664/261), false imprisonment by violence (Pen. Code, § 236) and attempted murder (Pen. Code, §§ 664/187). The court sentenced him to 10 years in prison.

Miller contends the court erred in admitting his admissions into evidence because they were obtained in violation

of his right to remain silent *(Miranda v. Arizona* (1966) 384 U.S. 436); the court abused its discretion in admitting evidence of prior, uncharged sexual offenses; and violated his due process rights by failing to instruct the jury it could not convict him solely because of the prior offenses. We affirm the judgment..

FACTUAL BACKGROUND

On November 29, 1997, the victim met her fiancee at Drifter's saloon in Imperial, where they and some friends stayed for three to four hours. The victim drank no alcoholic beverages because she was the designated driver.

People at Drifter's generally wore jeans, boots and cowboy hats. Miller attracted notice because he was wearing dress pants, a button-up shirt and jacket. After the friends left, the victim stated she was getting tired and wanted to leave. She walked to the restroom. On the way, a woman sitting next to Miller asked her the time. The victim answered and then continued walking down the hallway to the restroom.

A surveillance camera recording the people in Drifter's that evening showed Miller and the woman who spoke to the victim together. It showed the victim walking down the hallway

toward the restroom and Miller walking toward the restroom a short time later.

The victim testified another woman walked into the restroom ahead of her and went into the first stall. The victim, who went into the back stall, later heard the other woman leave, and as she finished using the restroom, heard someone come in. As she walked from her stall she caught a glimpse of someone standing in the first stall and thought the person might be a man because of his short, cropped hair, his heavy set, stocky appearance, and because he appeared to be wearing a jacket.

As the victim washed her hands, she glanced in the mirror and saw Miller, wearing a suit, coming around the corner of the first stall toward her. Miller grabbed the victim round her neck and pulled her back so tightly she could not breathe or speak. As she struggled, she lost consciousness.

When the victim did not return from the restroom, her fiancee walked past the closed restroom door and looked for her in the parking lot. He then noticed the restroom door, partly opened, and saw the victim's shoes placed in the first stall and the victim lying unconscious on the floor.

The victim had blood in her mouth and the whites of her

eyes were red. There were red marks on her neck, her shoes were off, her bra was pushed up above her chest and her jeans were pulled down very low on her hips. Her torn underwear was floating in the toilet and a pair of men's underwear was on the floor. The nurse who examined her testified there were no signs of vaginal trauma. The victim testified when she regained consciousness she said a man in a suit had attacked her. The bartender stated she knew who he was; Miller had given her his business card.

Al Gervin, who had met Miller on an earlier occasion, saw him at Drifter's that night and talked with him briefly. He said Miller was with a man and a woman; he thought he saw them leaving, but a half-hour later he saw Miller again leave the bar, looking nervous and fidgety. After that time Gervin heard someone had been hurt in the women's restroom.

Norberto Martinez testified he, his former girlfriend and Miller were together at a bar that night. Martinez said when they first got there Miller left quickly, and when he returned said he had gone to the girls' restroom by mistake and some girl had gotten angry with him.

At Miller's residence, police spoke with his mother and

searched his home. After arresting Miller, Officer Sean Acuna advised him of his *Miranda* rights and told him he was investigating an attempted rape and assault that had occurred at Drifter's. Miller said he had gone there with two friends, but denied being involved in the incident. He said he appeared on the videotape because he walked to the parking area to look for his friends and then walked back still looking for them. He said he and Martinez drank about six pitchers of beer and Clamato; he was drunk, but remembered his actions. He gave Acuna permission to retrieve the clothing he had worn that night. Miller's mother said Miller told her he had had a confrontation with a woman when he went into the women's restroom by mistake. She said she had already washed his clothing.

After Acuna told Miller of this conversation, Miller said he had gone to the women's restroom by mistake, had soiled his underwear and left them behind. He said as he was leaving a woman called him a name and pushed him. He pushed her back and left. When asked if it were possible she could have fallen and become unconscious, he said it was possible. Acuna asked if it were also possible that he had grabbed her around the neck. Miller said it was possible and he might have done it with his

thumbs.

Miller said a pair of pants, shirt and jacket from his closet were the clothes he had worn to Drifter's. The victim identified the shirt and jacket as those her attacker was wearing.

Miller's mother testified when he came home the morning after the incident, he was wearing a black suit, and a white shirt with maroon stripes. He told her the night before he drank Clamato, beer and tequila at a bar, had to use the restroom, went into the women's restroom by mistake, a woman touched him and used some strong words and he pushed the woman aside and then returned to the bar.

The defense claimed the victim had misidentified Miller, arguing until she viewed the videotape she did not identify him or say the man who attacked her had been at the bar all evening. The defense also argued no physical evidence linked Miller to the attack. Miller did not testify.

Prior Uncharged Acts

Laura Casillas testified she met Miller in Mexicali in 1995 or 1996 when he offered her a ride, stating he would take her home. Instead Miller drove to a dark location and forced her to have sexual intercourse. He then apologized and took her to

a pharmacy to buy medicine for her daughter. She said she did not call police because the Mexican police would not do anything.

Casillas testified about six months later Miller came to her house and they began a dating relationship. At first he treated her well, but one night forced her to perform oral sex, she yelled and the police responded. Miller talked with the police and told her he had taken care of everything. About a year later he invited her to work for him in the United States. Casillas worked in Miller's business for three to four months, lived at his house and had a consensual sexual relationship with him. She testified she did so because he said he would help her daughter immigrate. She said one day Miller poured whiskey into her mouth, and choked her with his forearm and thumbs. He told her to take off her clothes and had sexual intercourse with her, then cried and said he did not mean to do it. About a week later she called police.

DISCUSSION

I.

Miller asserts his admissions should not have been

received in evidence because they were obtained in violation of his right to remain silent. He argues his statement to Acuna at the sheriffs station, "there's nothing to talk about" was a clear assertion of his right to remain silent and everything he said after that, including later statements at the police station should have been excluded.

Under *Miranda v. Arizona, supra,* 384 U.S. at p. 444, an individual may not be subjected to interrogation in official custody unless he previously has been advised of and has knowingly and intelligently waived his right to silence, to an attorney and to an appointed attorney if he cannot afford to hire counsel. If the suspect indicates "in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Id. at pp. 473-474.) By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation" *Miranda* serves to guard against the use of unreliable statements at trial. *(Johnson v. New Jersey* (1966) 384 U.S. 719, 730.) A *Miranda* advisement is required when a person is subjected to questioning after he "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *(People v. Lopez* (1985) 163

Cal.App.3d 602, 605, quoting *Miranda v. Arizona, supra,* 384 U.S. at p. 444.)

In reviewing a claim of this nature we "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported." *(People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on other grounds in *People v. Sansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement[s] [were] illegally obtained." *(Ibid.)*

Prior to questioning Acuna advised Miller of his *Miranda* rights, asked Miller if he understood each right and advised that anything he said could be used against him. Miller answered he understood. This colloquy followed:

[Acuna]: "Okay. Do you want to talk about what happened?

[Miller]: "There's nothing to talk about.

[Acuna]: "Okay, well I'm asking you though. I have a lot of questions I need to ask you.

So do you want to talk to me or no?

[Miller]: "Okay . . . um . . . I can try.

[Acuna]: "Okay, you gotta say yes you want to talk to me, or no, you don't. I need to know so I can continue this report.

[Miller]: "Yes . . . I'll talk to you." [1]

At an Evidence Code section 402[2] hearing, the court found the statement, "there's nothing to talk about" could be viewed either as a figure of speech meaning Miller did not want to talk or, in fact, there was nothing to talk about. The court ruled, considering the totality of the circumstances, Miller had not invoked his *Miranda* rights.[3]

1

Although the record does not indicate the transcript of the colloquy was formally offered into evidence, at the Evidence Code 402 hearing, Acuna testified about the colloquy and referred to it during his testimony. In ruling on the motion to suppress, the court quoted from the transcript.

2

All statutory references are to the Evidence Code unless otherwise indicated.

3

The court stated:

"He's asked, 'Do you want to talk?'

"And he doesn't say, yes, and he doesn't say, no. He comes up with a statement that is really not relevant to the question, 'There's nothing to talk about.'

"The question was not, 'Is there something to talk

If a suspect makes an ambiguous or equivocal reference in response to a *Miranda* advisement, the officer is not required to immediately cease questioning. *(Davis v. United States (1994) 512 U.S. 452, 459.)* One must indicate invocation of his *Miranda* rights "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be" an articulation of his desire to invoke his *Miranda* rights. *(Ibid.)* In *Davis,* the court advised when a suspect makes an ambiguous or equivocal statement, it would often be good police practice to clarify whether or not he is actually invoking his *Miranda* rights, but did not set forth a rule requiring

---

about?' The question is: 'Do you want to talk?'

"And he responds in a nonresponsive fashion to the question. And I think it's legitimate for the officer to attempt to clarify that.

"He says, 'I have a lot of questions I need to ask you. So do you want to talk to me or not, yes or no, let me know. Tell me.'

"And he says, 'Okay, I can try.'

"And the officer still wants to clarify it. He wants to leave no room for doubt. And any time this man can say, 'Listen, I said, there's nothing to talk about.' But instead, the officer says, 'Okay, you've got to say, yes, if you want to talk to me or no, you don't. I need to know so I can write this report.'

"Finally he says, 'Yes, I'll talk to you.'

"Now given the totality of that scenario, it seems to me that the Defendant did not invoke his *Miranda* rights and that he waived those rights. Therefore, the Defendant's motion to suppress the evidence is hereby denied."

clarifying questions when a suspect responds equivocally. (Id. at p. 461-462.)[4]

Here, Acuna explained he thought Miller "wasn't actually saying he did not want to speak to me. He was just indicating there was nothing to talk about." Acuna reasonably followed Miller's statement, there was nothing to talk about, by telling him he had questions he needed to ask and therefore must know whether Miller was willing to talk to him. The court found Acuna's testimony to be credible and the clarifying question a valid response. Miller's statement was equivocal and Acuna prudently asked him clarifying questions to determine whether Miller was invoking his right to remain silent, but would talk to him. We conclude the statements were not obtained in violation of Miller's rights under *Miranda.*

Moreover, Acuna was not required to advise Miller of his *Miranda* rights when after about a one-hour break, he continued his interview at the police department. "'The law does

---

[4] In *Davis* the suspect, after being advised of his *Miranda* rights and asked whether he wanted to talk to the officers said, "Maybe I should talk to a lawyer." *(Davis v. United States, supra,* 512 U.S. at p. 455.) The court found the suspect's statement was not a request for counsel and the Supreme Court found no reason to disturb that conclusion.(Id. at p. 462.)

not require that a defendant be readvised of his rights prior to each separate interrogation.' *[Citation.]* Ten hour intervals [citation], and even next day interrogation [citation] have been found adequate." *(People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972-1973.) Acuna testified the second interview was merely a continuation of the first. The short break and the fact that the second interview took place at a different location are not significant. The second interview yeas reasonably contemporaneous with the first. Acuna was not required to readvise Miller of his *Miranda* rights.

II

Miller contends the court abused its discretion under section 352 by admitting graphic evidence of his prior uncharged sexual offenses. He claims the probative value of the evidence was clearly outweighed by substantial danger of undue prejudice.

Before trial the court ruled it would allow Casillas to testify about his prior sexual offenses against her. The court determined the evidence was admissible under section 1108, subdivision (a), which states:

> "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

In *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court upheld the constitutionality of section 1108. Quoting the appellate court in *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182, the Court stated:

> "'Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need far this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial." (*People v. Falsetta, supra*, 21 Cal.4th at pp. 911-912.)

Section 1101 deos not control admissibility when evidence is admissible under section 1108.

> "By reason of section 1108, the trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352[5] Rather

---

5 Section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a)

> than admit or exclude every sex offense a defendant commits, the trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." *(People v. Falsetta, supra,* 21 Cal.4th at pp. 916-917.)

Miller has not shown an abuse of discretion. The offenses described by Casillas were not remote in time and were no more inflammatory than the facts of the incident with which Miller was charged. It is unlikely the jury would have decided to punish him for the offenses against Casillas if it had not found him guilty of the crimes he was charged with committing against the victim in this case. The evidence against Miller was very strong, including his identification by his distinctive attire, the

---

necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Absent a clear showing of abuse, the trial court's exercise of discretion under this section will not be reversed. *(People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.)

videotape showing him walking down the hallway toward the restroom, and the fact he admitted having a confrontation with a woman there. Casillas's testimony did not result in an undue consumption of time. The evidence had substantial probative value under section 1108 in that it showed a propensity to force sexual relations, including one time where Casillas testified Miller choked her and squeezed her neck. The evidence was relevant to show his propensity (§ 1108) as well as his intent (§ 1101) to rape the victim on this occasion.

III

Miller contends the court violated his due process rights by failing to instruct the jury that as to the charge of attempted rape,[6] it could not convict him solely on the basis of his prior sexual offenses, an erroneous inference the jury could logically draw from the erroneous instruction given.[7]

---

[6] The instructional error urged does not affect the other counts of which Miller was convicted.

[7] We reject the People's claim Miller waived this argument by failing to object properly to the instructions at trial. The reviewing court will consider arguments concerning the defendant's substantial constitutional right to have all elements of a

Regarding the incidents about which Casillas testified, the court gave, over defense objection, the then current version of CALJIC No. 2.50.01:

> "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. Sexual offense means a crime under the law of a state or ofthe United States that involves any of the following:
>
> "A, Contact without consent between any part of the defendant's body or an object and the genitals or anus of another person.
>
> "B, Contact without the consent between the genitals or anus of the defendant and any part of another person's body.
>
> "C, Deriving sexual pleasure or gratification from the infliction of bodily injury or physical pain on another person.
>
> "D, An attempt to engage in specific sexual conduct identified in . subparagraphs A, B, or C herein.
>
> "If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type of sexual offenses. If you find that the defendant had this

---

criminal offense proved beyond a reasonable doubt even in the absence of an objection or request for a pinpoint instruction. (Pen. Code, § 1259; *People v. Roder* (1983) 33 Cal.3d 491, 497.)

> disposition, you *may*, but are not required to, *infer that he was likely to commit and did commit the crime of attempted rape* of which he is accused in count 1. Unless you are otherwise instructed, you must not consider this evidence for any other purpose." (Italics added.)

The court additionally instructed the prosecution had the burden to prove the prior offense by a preponderance of the evidence and not to consider the evidence unless it was proved by a preponderance of the evidence.

In 1999, CALJIC No. 2.50.01 was revised to include the following admonition:

> "However, if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]. The weight and significance of the evidence, if any, are for you to decide." (CALJIC No. 2.50.01 (1999 rev.)(6th ed. 1996.)

Miller asserts because the instruction given to the jury failed to include this admonition there is no assurance he was tried and convicted of his present, not his past, offenses.

When an instruction viewed in isolation appears deficient, the reviewing court must consider it in the context to the whole record. *(People v. Regaldo* (2000) 78 Cal.App.4th 1056, 1061-1062.) Although the instruction without the

cautionary admonition does suggest the jury may convict solely on prior offenses, we conclude the overwhelming evidence of Miller's guilt precludes a finding the erroneous instruction was reversibly prejudicial.[8]

Miller does not contend the jury was not properly instructed on each element nor does he dispute that the overwhelming evidence that his vicious attack was intended to culminate in rape is sufficient to satisfy an objective reviewer. Any instructional error was harmless beyond a reasonable doubt. *(Chapman v. California, supra,* 386 U.S. at p. 24.) In light of the strong evidence of guilt produced in this case, Miller focuses the issue of reversible prejudice as per se, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275.

In *Sullivan,* the United States Supreme Court held a constitutionally defective reasonable doubt instruction could not

---

[8]

We recognize the several current reported decisions which had grappled with the issue of whether the defect in former CALJIC No. 2.50.01 is rendered harmless when considered in light of additional instructions given have reached contrary conclusions. In light of our resolving Miller's contentions by reviewing the prejudicial effect of the instructional error by the principles in *Chapman v. California* (1986) 386 U.S. 18, 24, we express no opinion on those decisions.

be adjudged by a harmless error standard, but required automatic reversal. Although Miller asserts the erroneous portion of former CALJIC No. 2.20.01 "centered around" reasonable doubt, it is subject to per se treatment. General substantial errors which violate constitutional due process are reviewed by a harmless error analysis. *(Neder v. U.S.* (1999) 527 U.S. 1, 10; *Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *People v. Flood* (1998) 18. Cal.4th 470, 502.)

In *Neder,* the court emphasized *Sullivan's* per se holding applied only to constitutional due process errors which produce consequences which are unquantifiable and indeterminate, the "rare case" addressed in *Sullivan,* as vitiating all jury findings. *(Neder v. U.S., supra, 527* U.S. at p. 11.) Instructions which improperly advise jurors as to implications of mandatory rebuttable presumptions *(Yates v. Evatt, supra, 500 U.S.* at *p. 401; Rose v. Clark (1986) 478 U.S. 570, 579);* mandatory conclusive presumptions *(Carella v. California (1989) 491 U.S. 263, 265)* and misstatements of an element of a crime *(Pope v. Illinois (1987) 481 U.S. 497, 499)* have been reviewed for

harmless error.

The inferences referred to in former CALJIC No. *2.50.01* are similar to presumptions. Each permit drawing a conclusion from the existence of a certain set of facts. We are satisfied the same harmless error analysis ,approved by the foregoing federal decisions is appropriate. In that regard, we note the jurors found Miller was the person who assaulted and attempted to murder the victim during the incident in which her parties were torn and removed and her bra pushed up and her jeans pulled down. His abandoned undershorts were found nearby. The jurors were instructed the contents-of CALJIC No. *2.05.01* applied only to the attempted rape count, making it evident Miller's identity as the attacker was determined beyond a reasonable doubt without taint from any deficiency in CALJIC No. *2.50.01.* The jury was also properly instructed Miller's previous sexual offenses could be considered on the issue of his intent. In light of the overwhelming evidence of guilt, we conclude beyond a reasonable doubt any deficiency in -CALJIC No. *2.50.01* was harmless.

DISPOSITION The judgment is affirmed.

WORK, Acting P. J.
WE CONCUR

HALLER, J.

O'ROURKE, J.

APPENDIX "B"

Court of Appeal, Fourth Appellate District, Division One
No. D033142
S091556

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plantiff and Respondent

v.

JADIR ALEXANDER MILLER, Defendant and Appellant

Petition for review DENIED.

_____
Chief Justice